

No. 15822

United States
Court of Appeals
for the Ninth Circuit

O. H. BENGSTON, Administrator of the Estate
of Phinice Van Pelt, deceased, Appellant,

vs.

ANDREW NESHEIM, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

FEB 13 1958

PAUL P. O'BRIEN, Clerk



No. 15822

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for the Ninth Circuit

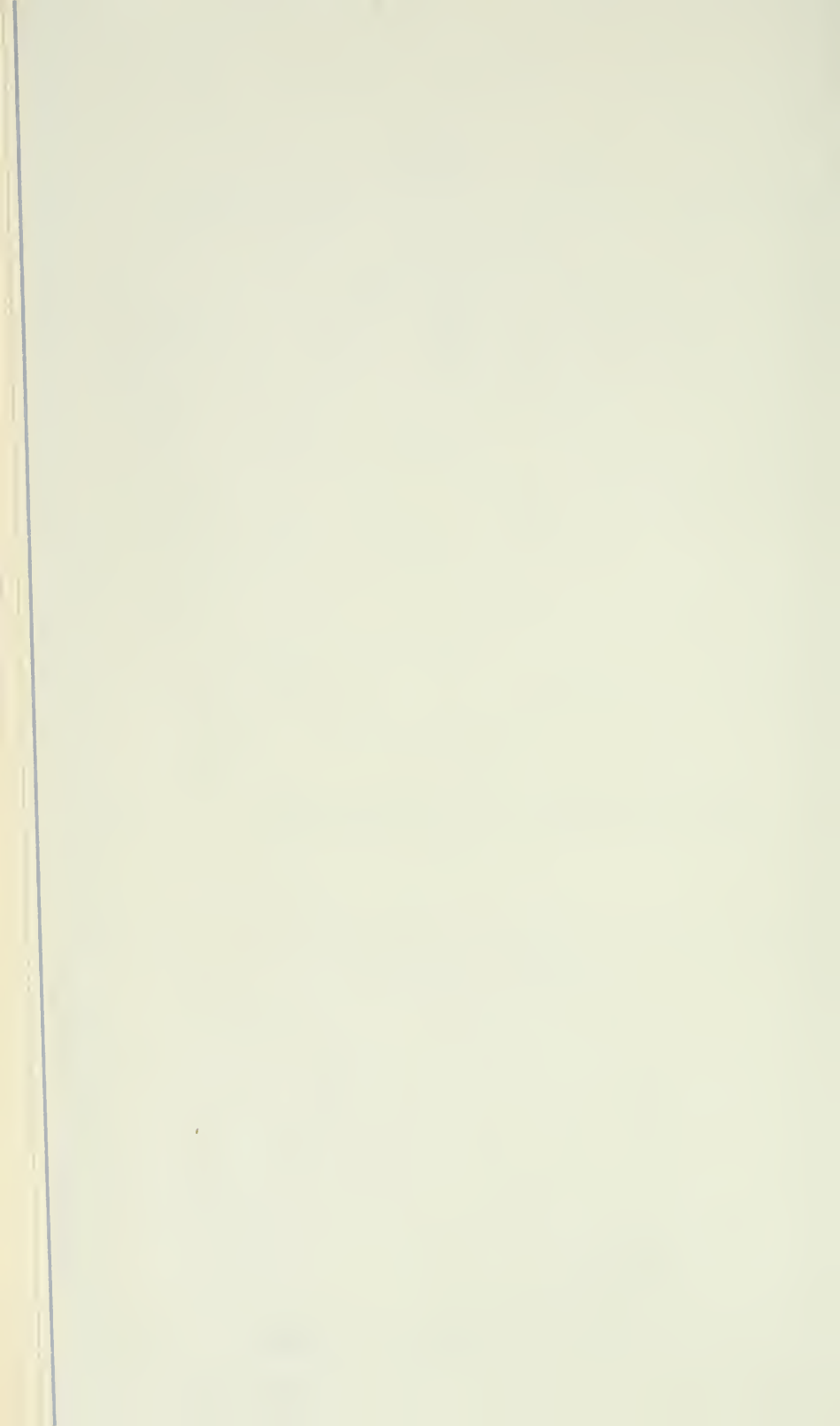
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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JOHN J. KEOUGH,

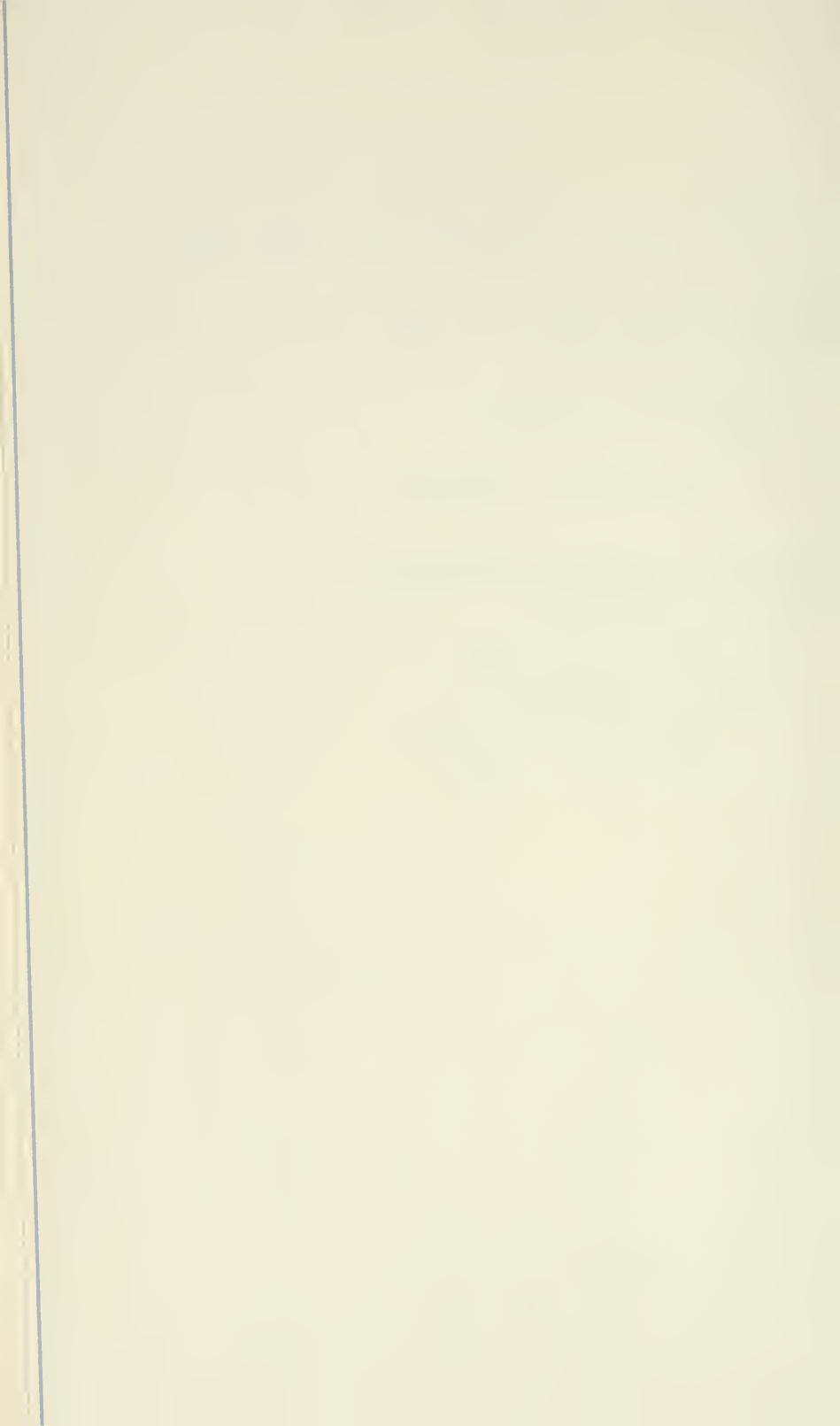
725 Central Building,
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Attorneys for Appellant.

HULLIN & EHRLICHMAN and
JOHN A. ROBERTS,

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Seattle 4, Washington.

Attorneys for Appellee.



In the United States District Court, Western
District of Washington, Northern Division

Civil No. 4321

O. H. BENGSTON, as Administrator of the Estate
of Phinice Van Pelt, Deceased, Plaintiff,

vs.

ANDREW NESHEIM, Defendant.

COMPLAINT AT LAW FOR WRONGFUL
DEATH—DEMAND FOR JURY TRIAL

Comes Now plaintiff and alleges:

I.

That plaintiff brings this action in his capacity as administrator of the Estate of Phinice Van Pelt, commenced and pending in the County Court of the State of Oregon for the County of Curry, and that Plaintiff is now a resident of Jackson County of the State of Oregon, and Phinice Van Pelt during his lifetime was a resident of Curry County in the State of Oregon, and the defendant is a resident of City of Edmonds, County of Snohomish, State of Washington, by reason whereof a diversity of citizenship exists between the parties.

II.

That this is a civil action to recover damages for personal injuries and the matter and amount in dispute exceeds the sum of Three Thousand Dollars

(\$3,000.00), exclusive of interest and costs, and judgment is demanded in the sum of Twenty Thousand Dollars (\$20,000.00), general damages.

III.

That on the 17th day of January, 1955, defendant was an independent contractor employed by the Oregon State Highway Department for the purpose of painting the Chetko Bridge at Brookings, Oregon. That on said day, the defendant removed two or more planks on the foot bridge, which goes along the westerly side of said bridge and, thereafter, negligently failed to fasten down said boards in a secure fashion. That on the 17th day of January, 1955, Phinice Van Pelt, while crossing said foot bridge, fell through the hole left by the defendant as the result of removing and failing to fasten said planks securely, and plaintiff's deceased was drowned in the Chetko River.

IV.

That as a proximate result of the negligence of the defendant, plaintiff's deceased was killed. That at and prior to the time of January 17, 1955, Phinice Van Pelt was an able bodied man employed and earning, and capable of earning, substantial sums of money, to wit, Six Thousand Dollars (\$6,000.00) per year. That Phinice Van Pelt left surviving him a widow, but no children, or other heirs.

V.

Plaintiff brings this action as Administrator of the Estate of Phinice Van Pelt, Deceased, for the

benefit of the surviving spouse. That plaintiff, as administrator, has been damaged in the amount of Twenty Thousand Dollars (\$20,000.00).

VI.

Plaintiff seeks a trial by jury.

Wherefore, plaintiff prays for a jury trial and for a judgment against the defendant for Twenty Thousand Dollars (\$20,000.00), general damages, and for costs and disbursements incurred herein.

/s/ JOHN J. KEOUGH,
MICHAEL J. CAFFERTY,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 6, 1957.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant above named and for answer to plaintiff's Complaint alleges as follows:

I.

For the answer to Paragraph I, this defendant alleges that he is without sufficient information to form a belief as to plaintiff's capacity, residence and actions therein alleged, and further, as to decedent's residence, and therefore deny the same, but defendant admits he is a resident of Edmonds, Snohomish County, Washington.

II.

The defendant admits the allegations contained in Paragraph II of the Complaint.

III.

The defendant denies each and every allegation contained in Paragraphs III, IV, and V of plaintiff's complaint.

For Further Answer, And By Way Of First Affirmative Defense, the defendant alleges:

I.

That plaintiff's cause of action, if any, must be based on Section 30.020 of Oregon Revised Statutes.

II.

That this action was not commenced within two years after the death of the decedent and therefore is barred by the limitation of time expressed in said statute.

III.

That Oregon Revised Statute, Section 30.020 provides:

"Oregon Revised Statute—30.020. Action By Personal Representative For Wrongful Death. When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the surviving spouse and dependents, and in case that there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have

maintained an action, had he lived, against the wrongdoer of the injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages cannot exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.”

and was in full force and effect at the time and place of decedent's alleged death.

For Further Answer, And By Way Of Second Affirmative Defense, the defendant alleges:

I.

That if the plaintiff's decedent was killed as in the complaint set forth, such death was proximately caused by the negligence and want of due care of the decedent in failing to exercise his physical senses and prudently conduct himself so as to avoid harm to himself.

Wherefore, having fully answered, defendant prays that plaintiff's Complaint against him be dismissed and that he have and recover a judgment against the plaintiff for his costs and disbursements hereinafter to be taxed.

HULLIN & EHRLICHMAN,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes Now the defendant, above named, by his attorneys of record, and respectfully moves the Court for summary judgment under Rule 56 (b), F.R.C.P., in this cause for the reason that the pleadings, Stipulation and Admissions of Fact on file herein leave no factual issues to be determined upon the trial of the action and that this cause can and should be determined by the Court solely as a matter of law.

This motion is based upon the files and record herein and upon the affidavit of John A. Roberts, Jr., attached hereto, and by this reference made a part hereof.

HULLIN & EHRLICHMAN,

/s/ By JOHN A. ROBERTS, JR.,
Counsel for Defendant.

AFFIDAVIT

State of Washington
County of King—ss.

John A. Roberts, Jr., being first duly sworn, on oath, deposes and says:

That he is associated with the firm of Hullin & Ehrlichman and as such is of counsel for the defendant herein and that he makes this affidavit in support of the foregoing Motion for Summary Judgment;

Your affiant respectfully states that he has carefully reviewed the files and records herein and noted the following pertinent facts which are not in dispute and which, in your affiant's opinion, leave no material issue of fact to be determined upon the trial of this cause. Such facts are as follows:

(1) In plaintiff's complaint it is alleged that the decedent, Phinice Van Pelt, fell from a bridge and drowned in Chetko River; that such fall and resulting drowning was the result of the negligent acts of the defendant; and that all such acts occurred within the territorial jurisdiction of the State of Oregon.

(2) The plaintiff's complaint further alleges that this action was brought by the Administrator of the decedent's estate for the benefit of the surviving spouse.

(3) The defendant's Answer, as a First Affirmative Defense, pleads, in haec verba, Section 30.020 of the Oregon Revised Statutes and further alleges that plaintiff's cause of action, if any, must be based on that section of the Oregon State Law and further alleges that the instant action was not commenced within two years after the death of the decedent and therefore is barred by the limitation of time expressed in said section of the Oregon Revised Statutes.

(4) In the Reply filed herein by the plaintiff, all affirmative matters pleaded in the defendant's First

Affirmative defense are admitted, except that the plaintiff expressly denies that this action is barred by the limitation of time expressed in Section 30.020 of the Oregon Revised Statutes, it being the plaintiff's contention that Washington State law relative to limitation of actions, should control. In addition, the parties have entered into a written Stipulation concerning all facts deemed by your affiant essential to the determination of this cause on questions of law, which Stipulation is, by this reference, incorporated hereby as though fully set forth.

Accordingly, your affiant verily believes that no issue of fact remains to be determined and that in the interest of avoiding costly trial preparation, the issue of law should be tendered to the court to determine whether the law of the State of Oregon or of the State of Washington should be applied in the premises;

Your affiant further states that if this court rules that the law of the State of Oregon controls, then, and in that event the plaintiff's complaint should be dismissed as a matter of law.

/s/ JOHN A. ROBERTS, JR.

Subscribed And Sworn to before me this 13th day of September, 1957.

[Seal] /s/ JAMES M. ANDERSON,
Notary Public in and for the State of Washington,
residing at Seattle, Wash.

Acknowledgment of Service Attached.

[Endorsed]: Filed Sept. 19, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between counsel for the respective parties as to the following facts in this cause and in particular for defendant's motion for summary judgment.

1. That on or about January 17, 1955 Phinice Van Pelt was *drown* in the Chetko River in the State of Oregon.

2. That approximately two (2) years and three (3) weeks after the death of said Phinice Van Pelt, plaintiff commenced action against the defendant Andrew Nesheim in the United States District Court of the Western District of Washington alleging that negligence of said defendant was the proximate cause of the death of said Phinice Van Pelt.

3. That at all times pertinent to this action there was in full force and effect in the State of Oregon the following statute:

O.R.S. 30.020

“Action by personal representative for wrongful death.”

“When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents, and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent may

maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral burial doctor, hospital and nursing services for the deceased."

4. That at all times pertinent to this action there was in full force and effect in the State of Oregon the following statute:

O.R.S. 12.150

"Suspension of running of statute by absence or concealment. If, when a cause of action accrues against any person, he is out of the state or concealed therein, such action may be commenced within the applicable period of limitation in this chapter after his return into the state, or the time of his concealment; and if, after a cause of action has accrued against a person, he shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement or such action."

5. That the defendant departed from the State of Oregon to the State of Washington at a time less than two (2) years before plaintiff commenced this action.

6. That at all times pertinent to this action the

following statute was in full force and effect in the State of Washington:

R.C.W. 4.16.180 Statute Tolled By Absence From State, Concealment, Etc.

“If the cause of action shall accrue against any person who is a non-resident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action. (1927 c 132 §1; Code 1881 §36; 1854 p 364 §10; RRS §168)”

Dated this 13th day of September, 1957.

/s/ JOHN J. KEOUGH,
Of Counsel for Plaintiff.

/s/ JOHN A. ROBERTS, JR.,
HULLIN & EHRLICHMAN,
Counsel for Defendants.

[Endorsed]: Filed Sept. 19, 1957.

In the United States District Court, Western
District of Washington, Northern Division

Civil Action No. 4321

O. H. BENGSTON, as Administrator of the Estate
of Phinice Van Pelt, deceased, Plaintiff,

vs.

ANDREW NESHEIM, Defendant.

ORDER ON MOTION FOR SUMMARY
JUDGMENT

The above-entitled cause came regularly on for hearing before the Court on September 23, 1957, pursuant to notice, on the motion of the defendant for summary judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure.

Mr. John J. Keough appeared on behalf of the plaintiff and Mr. John A. Roberts, Jr., of Hullin & Ehrlichman appeared on behalf of the defendant.

The admitted facts in evidence, necessary to determine this motion are the following:

(1) On January 17, 1955, Phinice Van Pelt was drowned in the Chetko River in the State of Oregon.

(2) Approximately two years and three weeks after the death of said Phinice Van Pelt, the plaintiff commenced this action against the defendant Andrew Nesheim in the United States District Court for the Western District of Washington al-

leging that negligence of the said defendant was the proximate cause of the death of the said Phinice Van Pelt.

(3) At all times pertinent to this action there was in full force and effect in the State of Oregon the following statute:

“O.R.S. 30.020. Action By Personal Representative For Wrongful Death. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents, and, in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital and nursing services for the deceased.”

(5) That the defendant departed from the State of Oregon to the State of Washington at a time less than two years before the plaintiff commenced this action.

On this showing, the defendant has established from the pleadings and admissions on file herein that the plaintiff has no cause of action and such

showing has not been successfully controverted by plaintiff. The Court reaches this conclusion being of the opinion that under the Oregon Wrongful Death Statute, as indicated by the decision in *Laidlow v. Oregon Railway & Navigation Co.*, (C.A. 9, 1897) 81 Fed. 876, this action would have been barred and non-existent, if on the day it was filed in this Court, it had been filed in the courts of the State of Oregon. In arriving at this conclusion, the Court has further considered the decisions in *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358, *Hansen v. Hayes*, (1944) 175 Or. 358, 154 p. (2d) 202, and the editorial comments in 16 Am. Jur., p. 52, Sec. 66 and p. 115, Sec. 170. The Court has further considered and is of the opinion that the general statute, providing under certain circumstances, for the tolling of Washington State's various statutes of limitation could not apply to this action. Accordingly, as a matter of law, the defendant is entitled to judgment on the pleadings in his favor, and for his taxable costs incurred herein in the total amount of \$15.00, Statutory Attorney's fee.

It Is So Ordered.

Done In Open Court this 27th day of September, 1957.

/s/ JOHN C. BOWEN,
Judge.

Presented and Approved by:

/s/ JOHN A. ROBERTS, JR.
HULLIN & EHRLICHMAN,
Counsel for Defendant.

Approved as to form by:

/s/ JOHN J. KEOUGH,
Counsel for Plaintiff.

[Endorsed]: Filed and Entered September 27,
1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that O. H. Bengston, plaintiff in the above named action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order Granting Defendant's Motion For Summary Judgment entered in this Court on September 27, 1957.

MICHAEL J. CAFFERTY and
JOHN J. KEOUGH,
/s/ JOHN J. KEOUGH,
Attorneys for plaintiff.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, O. H. Bengtson, the Plaintiff, above named as Principal, and the General Insurance Company of America, a corporation organized under the laws of the State of Washington, and

authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Andrew Nesheim, the Defendant, above named in the just and full sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of October, A.D. 1957.

The Condition of This Obligation Is Such, That,

Whereas, the above named defendant on the 27th day of September, A.D. 1957, in the above entitled action and court, recovered judgment against the plaintiff above named for summary judgment and cost.

And Whereas, the above named Principal has heretofore given due and proper notice that he appeals from said decision and judgment of said Court.

Now, Therefore, if the said Principal, O. H. Bengtson, shall pay to Andrew Nesheim, all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] GENERAL INSURANCE COM-
PANY OF AMERICA,

/s/ By J. S. RADFORD,
Attorney-in-Fact.

Countersigned:

DAWSON & CO., INC.,

/s/ By [Illegible],

Resident Agent, Seattle,
Washington.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP I am transmitting herewith the following original documents in the file dealing with the above action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Feb. 6, 1957.
2. Bond for Costs, Non-Resident Plaintiff, filed Feb. 6, 1957.
3. Summons with Marshal's return thereon, filed Feb. 12, 1957.
4. Appearance of Defendant, filed Feb. 23, 1957.

5. Notice of Expiration of Time to Answer, filed Feb. 27, 1957.

6. Motion to Dismiss, filed Mar. 5, 1957.

7. Note for Motion Docket, filed 3-5-57.

8. Motion for Default, filed Mar. 6, 1957.

9. Motion Plaintiff to Strike defendant's Motion to Dismiss, filed 3-6-57.

10. Note for Motion Docket, filed 3-6-57.

11. Motion for Enlargement of Time to File Motion to Dismiss, filed 3-14-57.

12. Note for Motion Docket, filed 3-14-57.

13. Defendant's Memorandum Opposing Plaintiff's Motion to Strike Defendant's Motion and Plaintiff's Motion for Default, filed 3-14-57.

14. Plaintiff's Additional Memorandum in Opposition to Defendant's Motion to Dismiss and In Support of Plaintiff's Motion to Strike, filed 3-18-57.

15. Answer of Defendant, filed Mar. 28, 1957.

16. Reply, filed Apr. 8, 1957.

17. Motion Defendant for Summary Judgment, filed 9-19-57.

18. Affidavit of Robert T. Mautz, filed Sep. 19, 1957.

19. Memorandum in Support of Defendant's Motion for Summary Judgment, filed Sept. 19, 1957.

20. Stipulation as to certain facts, filed Sept. 19, 1957.

21. Note for Motion Docket, filed Sept. 19, 1957.

22. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, filed Sept. 20, 1957.

23. Order on Motion for Summary Judgment (Defendant's Motion Granted). Filed Sept. 27, 1957.

24. Notice of Appeal, filed Oct. 28, 1957.

25. Bond for Costs on Appeal, filed Oct. 28, 1957.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for the appellant.

Witness my hand and official seal at Seattle this 26th day of November, 1957.

[Seal] MILLARD P. THOMAS,
 Clerk,

/s/ By TRUMAN EGGER,
 Chief Deputy.

[Endorsed]: No. 15822. United States Court of Appeals for the Ninth Circuit. O. H. Bengston, Administrator of the Estate of Phinice Van Pelt, deceased, Appellant, vs. Andrew Nesheim, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: November 27, 1957.

Docketed: December 19, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15822

O. H. BENGSTON, as Administrator of the Estate
of Phinice Van Pelt, deceased, Appellant,

vs.

ANDREW NESHEIM, Appellee.

STATEMENT OF POINTS

Comes now the plaintiff and respectfully alleges as follows the errors committed by the United States District Court for the Western District of Washington, from which this plaintiff appeals to the United States Court of Appeals for the Ninth Circuit.

I.

The Court erred in granting defendant's Motion for Summary Judgment.

II.

The Court erred in decreeing that the plaintiff take nothing by his complaint.

III.

The Court erred in denying plaintiff his right to trial by jury on an issue of fact.

MICHAEL J. CAFFERTY,
JOHN J. KEOUGH,
/s/ JOHN J. KEOUGH,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 19, 1957. Paul P.
O'Brien, Clerk.

